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MAY 1995

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STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT

State/Territory: New York

LIENS AND ADJUSTMENTS OR RECOVERIES

1. The State uses the following process for determining that an institutionalized individual cannot reasonably be expected to be discharged from the medical institution and return home:

See Supplement to Attachment 4.17-A

2. The following criteria are used for establishing that a permanently institutionalized individual's son or daughter provided care as specified under regulations at 42 CFR §433.36(f):

A son or daughter can establish that he or she has been providing care which permitted the individual to reside at home by submitting evidence that he or she made arrangements or actively participated in arranging for care, either directly or indirectly, full-time or part-time.

3. The State defines the terms below as follows:
 - o estate all real and personal property and other assets included within an individual's estate, and passing under the terms of a valid will or by intestacy.
 - o individual's home the former principal place of residence owned by the permanently institutionalized individual or the deceased recipient.
 - o equity interest in the home an individual's right to the use of and share in the proceeds from the sale of the property, as demonstrated by the presence of his/her name on the title.
 - o residing in the home for at least one or two years on a continuous basis, and evidence that the relative was in residence on a regular basis for the continuous one or two years.
 - o lawfully residing. the fact of the son or daughter's presence in the home as evidenced by postal, motor vehicle, or voting records or by the testimony of a neighbor or other party.

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4. The State defines undue hardship as follows: Undue hardship must be determined on a case by case basis. It includes (a) loss of a family farm or other family owned and operated business which is an income-producing asset, and (b) other compelling cases.
5. The following standards and procedures are used by the State for waiving estate recoveries when recovery would cause an undue hardship, and when recovery is not cost-effective:

See Supplement to Attachment 4.17-A

6. The State defines cost-effective as follows (include methodology/thresholds used to determine cost-effectiveness): Cost-effectiveness is determined by weighing the amount available for recovery against the expected cost of the recovery action. If finite resources are a factor, the amount of a given potential recovery less its cost must then be weighed against the potential net return of other recovery actions.
7. The State uses the following collection procedures (include specific elements contained in the advance notice requirement, the method for applying for a waiver, hearing and appeals procedures, and time frames involved):
Collection Procedures: TEFRA liens are filed against the homesteads of permanently institutionalized individuals. Liens are also filed against the estates of recipients who were permanently institutionalized or 55 years of age or older upon death.
Advance Notification: Language on the Application for Public Assistance, Medical Assistance, Food Stamps, and Services now explains that a recovery may be sought for MA paid from the sale of the home of the applicant (if permanently institutionalized) or from his/her estate. The notification will also be placed in a pamphlet to be distributed at the time of application.
Waiver Applications: These are filed as are any other disputed claims against estates through the State's Surrogate Court, which has jurisdiction over all matters related to estate settlements.
Appeals: A living recipient's appeal regarding a property lien or other recovery action may be made by a conference with the social services district and/or the standard fair hearing process.
Time Frames: All actions against the assets of living recipients are subject to timely notification requirements (at minimum ten days). A decedent's assets may not be distributed until at least six months after the appointment of an estate administrator.

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1. It will be presumed that an individual will not return home if:
 - (1) a person enters a skilled nursing or intermediate care facility;
 - (2) a person is initially admitted to acute care and is then transferred to an alternative level of care, pending placement in a residential care facility (RHCf); or
 - (3) a person without a community spouse remains in an acute care hospital for more than six calendar months.

The individual or his/her representative may submit medical statements providing evidence that s/he may reasonably be expected to return home, contrary to the presumption of permanent placement based on his/her residence in a medical institution. Should the argument that the placement is temporary be rejected by the social services district, the client or his/her representative may appeal the decision through the fair hearing process.

5. Notification:

Advance notification of estate recoveries is provided. Applicants are notified at the time of application that recoveries against their estates may be undertaken.

Recoveries from estates must be made in accordance with the procedures established under the Surrogate's Court Procedure Act (SCPA) with respect to claims against decedents' estates, including recoveries against estates which the social services district waives based upon undue hardship.

When asserting a recovery against the estate of a deceased Medical Assistance (MA) recipient, the social services district must notify the estate's representative in writing of the claim against the estate. This notice should be served on the estate's fiduciary within seven months of the issuance of letters testamentary or letters of administration by the Surrogate Court. The social services district should send the notice to the estate's fiduciary by personal delivery, or by certified mail, return receipt requested, pursuant to §1803 of the SCPA.

The notice sent by the social services district to the estate's fiduciary should set forth the amount of the claim, and must explain that if the representative asserts that the estate recovery would work an undue hardship upon the estate, the social services district may consider waiving the adjustment or recovery. The notice should advise that undue hardship may exist when:

- the estate asset subject to recovery is the sole income-producing asset of the beneficiaries, such as a family farm or family business, and income produced by the asset is limited;

- the estate asset subject to recovery is a home of modest value;
- there are other compelling circumstances.

The notice also should advise that undue hardship will not be found by the social services district where the hardship is the result of Medicaid or estate planning methods involving divestiture of assets, or where the only hardship that would result is the inability of any of the beneficiaries to maintain a pre-existing life-style.

Waiving recoveries based on undue hardship:

The estate fiduciary must give prompt written notice to the social services district of its rejection of the claim in part or in whole together with an explanation of the basis for the undue hardship. (See §1806 of the SCPA). Upon rejection of the claim by the fiduciary based upon undue hardship, if the social services district does not find a basis for the undue hardship, it may object to the claim rejection in an accounting proceeding or by petitioning the Surrogate Court to decide whether the claim should be paid.

In an accounting proceeding, the social services district may file an objection to the fiduciary's account which rejects its claim based on undue hardship, and have the validity of the claim determined by the Surrogate on this basis. (See §1808 of the SCPA). The social services district must file the objection to the account within eight days of receiving the fiduciary's notice of rejection based on undue hardship. (See §1808 of the SCPA). If the fiduciary has any affirmative defenses to the social services district's objection to the account, which were not set forth in the rejection served on the district, the fiduciary must reply setting forth the affirmative defenses within five days of the social service's district's service of its objection to the account. (See §1808 of the SCPA). Additionally, a beneficiary, or any other person whose interest in the estate would be adversely affected by allowance of the district's claim may, within eight days of the social services district's filing of its objection to the account, reply to the district's objection by setting forth any affirmative defense not set forth in the fiduciary's account. (See §1808 of the SCPA).

Alternatively, upon receiving notice that the estate's fiduciary has rejected the claim based upon undue hardship, if the social service district does not find adequate basis for waiving the recovery, it may petition the Surrogate Court within sixty days of the fiduciary's rejection of the claim showing the facts and requesting that the fiduciary show cause why the claim should not be allowed. (See §1810 of the SCPA).

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Where the fiduciary has not allowed the claim in whole, the social services district also may petition the Surrogate Court showing the facts of its claim and requesting that the fiduciary be ordered to show cause why the claim should not be allowed and paid, including in cases where it deems the claim rejected because the fiduciary has not allowed the claim within ninety days or has not served notice rejecting the claim within that period. (See §1809 of the SCPA). The fiduciary is then required to answer the petition, setting forth the basis for any undue hardship, within five days of being cited with the petition. (See §1809 of the SCPA).

Pursuant to §1809 of the SCPA, the estate fiduciary also may present a petition to the Surrogate Court showing the facts of a disputed claim, and requesting that the district be required to show cause why the claim should not be disallowed based upon undue hardship. The fiduciary also may petition the Surrogate Court pursuant to §1809 of the SCPA in cases where he or she is aware that a social services district may have a claim which the estate wishes to reject based upon undue hardship, but the social services district has failed to serve a notice of the claim. The social services district is then required to answer within eight days of being cited with the petition. The fiduciary then has five days from service of the answer by the social services district to serve and file a reply to the answer.

Cost-effectiveness Standards and Procedures:

The social services districts are authorized to make judgments as to the cost-effectiveness of recoveries based upon their knowledge of the amount of recovery from each type of recovery, and the costs of pursuing each type of recovery.

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